Supreme Court, U.S.
FILED
DEC 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-864

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH STOUT and BARBARA STOUT,

Petitioners,

vs.

A.M. SUNRISE CONSTRUCTION COMPANY, INC. and COLE & ASSOCIATES, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA AND THE INDIANA COURT OF APPEALS

STEVEN A. JOHNSON *
DANIEL A. GIOIA
KATHLEEN M. MAICHER
SPANGLER, JENNINGS, SPANGLER & DOUGHERTY, P.C.
8396 Mississippi Street
Merrillville, Indiana 46410
(219) 769-2323

Attorneys for Respondent,
COLE & ASSOCIATES, INC.

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

33 pp

QUESTIONS PRESENTED

I. Whether dismissal of a plaintiff's complaint as a sanction for allegedly failing to comply with a discovery order is a denial of due process where the defendants hid documents which the plaintiff needed for compliance and harassed the plaintiff's expert so that he withdrew from the case?

II. Is it a denial of due process to dismiss a complaint as a sanction for non-compliance with a discovery order where no finding was made that plaintiff's alleged failure was willful or in bad faith, and where defendants were not prejudiced because the information had already been provided except for plaintiff's expert's opinion and the underlying technical data needed by plaintiff's expert to give his opinion was in the documents defendants had hidden—and thus already had within their knowledge and control?

III. Is it a denial of due process where the plaintiff, a paraplegic, suffers dismissal of his complaint for the alleged failure of his counsel to make adequate responses to interrogatories and the plaintiff is totally blameless?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE FINAL JUDGMENT OF THE SUPREME COURT OF INDIANA IN THIS CASE FOR THE REASON THAT THE ALLEGED FEDERAL QUESTIONS PRESENTED TO THIS COURT HAVE NEVER BEEN PROPERLY RAISED, PRESERVED OR PASSED UPON BY THE STATE COURT BELOW	11
II. DISMISSAL OF THE COMPLAINT OF THE PLAINTIFFS, JOSEPH AND BARBARA STOUT, AGAINST THE DEFENDANTS, COLE & ASSOCIATES, INC. AND A.M. SUNRISE CONSTRUCTION COMPANY, INC., WAS AN APPROPRIATE SANCTION FOR PLAINTIFFS' REPEATED FAILURE TO COMPLY WITH INDIANA COURT RULES AND THE TRIAL COURT'S DISCOVERY ORDERS	14

A. Cole Was Prejudiced And Its Rights Obstructed By Plaintiffs' Continued Non-Compliance With Court Orders 16

B. Petitioners' Charge Of Obstruction Of Justice Is Unfounded And Has No Factual Basis In The Record Before The Court .. 18

C. The Trial Court Need Not Have Specifically Found That The Plaintiffs Acted Willfully Or In Bad Faith 19

D. Plaintiffs' Answers To Cole's Interrogatories Were Inadequate And Plaintiffs Never Provided The Name Of Their Expert Witness As Directed By The Court On February 22, 1985 21

III.

DISMISSAL OF THE PLAINTIFFS' COMPLAINT AS A SANCTION FOR NON-COMPLIANCE WITH PRE-TRIAL DISCOVERY REQUESTS IS NOT A VIOLATION OF THE DUE PROCESS GUARANTEES OF THE PLAINTIFFS IN THAT THE PLAINTIFFS ARE RESPONSIBLE FOR THEIR ATTORNEY'S ACTS OR OMISSIONS 23

CONCLUSION 25

APPENDIX—Court of Appeals' Denial of Petition for Rehearing A-1

TABLE OF AUTHORITIES

CASES:	PAGE
Breedlove v. Breedlove, ___ Ind. App. ___, 421 N.E.2d 739 (1981)	20
Burns v. St. Mary Medical Center, ___ Ind. App. ___, 504 N.E.2d 1038 (1987)	19
Cine Forty-Second Street Theater Corporation v. Allied Artists, 602 F.2d 1062 (2nd Cir. 1979)	24
Farm Construction Services, Inc. v. Fudge, 831 F.2d 18 (1st Cir. 1987)	24
Foote v. Baltimore & Ohio Railroad Company, ___ Ind. App. ___, 465 N.E.2d 219 (1984)	20
Greenbriar Hills, Inc. v. Boes, ___ Ind. App. ___, 473 N.E.2d 1040 (1985)	12
Ingalls Shipbuilding, Inc. v. United States, 857 F.2d 1448 (Fed. Cir. 1988)	18
Kagan v. Caterpillar Tractor Company, 795 F.2d 601 (7th Cir. 1986)	24
Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386 (1962)	23, 24
Mulroe v. Angerman, ___ Ind. App. ___, 492 N.E.2d 1077 (1986)	19, 20
National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 96 S.Ct. 2778 (1976)	16, 20
Nichols v. Indiana State Highway Department, ___ Ind. App. ___, 491 N.E.2d 227 (1986)	20
Orkin Exterminating Company, Inc. v. Traina, ___ Ind. App. ___, 486 N.E.2d 1019 (1986)	12

Pitts v. Johnson County Department of Public Welfare, ____ Ind. App. ____, 491 N.E.2d 1013 (1986) 20

Thompson v. Daviess-Martin County REMC, ____ Ind. App. ____, 486 N.E.2d 1102 (1985) 12

Tolliver v. Northrop Corp., 786 F.2d 316 (7th Cir. 1986) 24

Williams v. Graber, ____ Ind. App. ____, 485 N.E. 2d 1369 (1985) 12

Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889 (1981) . 13, 14

OTHER AUTHORITIES:

Supreme Court Rule 21.1(h) 11

Indiana Rules of Trial Procedure, Rule 37(A)(3) 12, 23

Indiana Rules of Trial Procedure, Rule 37(B)(2)(c) 12, 19, 20

Indiana Rules of Trial Procedure, Rule 59 12

STATUTES:

28 U.S.C. § 1257(3) 2, 11

No. 88-864

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH STOUT and BARBARA STOUT,

Petitioners,

vs.

A.M. SUNRISE CONSTRUCTION COMPANY, INC. and COLE & ASSOCIATES, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA AND THE INDIANA COURT OF APPEALS

OPINIONS BELOW

The dismissal orders of the trial court, the Porter Superior Court sitting at Valparaiso, Indiana, are set forth in Appendices A-1 and A-2 of the petition filed in this case; the petitioners, however, have erroneously referred to the dismissal orders of the "Superior Court of Lake

County, Indiana" in the body of their Petition. *See* Petition, p. 1.

Petitioners include the opinion of the Court of Appeals of Indiana, Fourth District, and the denial of their Petition to Transfer by the Supreme Court of Indiana in Appendix B and Appendix C of the petition. Omitted from the petition is the denial of their Petition for Rehearing to the Court of Appeals of Indiana, Fourth District, filed by petitioners. That is set forth in the Appendix of this brief. *See* Appendix A.

JURISDICTION

Respondent, Cole & Associates, Inc., disagrees with the statement of jurisdiction presented. Petitioners attempt to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(3) (1982). As applied to the circumstances of this case, petitioners must show that they have "specially set up or claimed under the Constitution . . . of . . . the United States" the right sought to be enforced here. The alleged federal questions raised here have never been raised, preserved or passed upon in the state courts below. Therefore, this Court is without jurisdiction in this case.

STATUTES INVOLVED

The statutes allegedly involved are adequately set forth in the petition.

STATEMENT OF THE CASE

The petition stems from the dismissal of the plaintiffs' cause of action by the Porter Superior Court for their repeated failure to comply with the Court's discovery orders.

On October 3, 1979, Joseph and Barbara Stout, by their attorneys, Leonard Ring and Associates, filed a Complaint naming A.M. Sunrise Construction Company, Inc. (A.M. Sunrise), Cole & Associates, Inc. (Cole), and Central Rent-A-Crane, Inc. (Central Crane) as defendants. The action for personal injuries arose out of an alleged incident on October 3, 1977 at the construction site of the George Bibich Elementary School in Dyer, Lake County, Indiana, in which the plaintiff, Joseph Stout, fell from a beam approximately fourteen (14) feet above the ground while engaged in securing such beam to a steel column.

On October 23, 1979, Cole filed its Answer (R., pp. 63, 66). Answers were subsequently filed by Central Crane on November 7, 1979 and by A.M. Sunrise on December 7, 1979 (R., pp. 71, 117). Filed concurrently with A.M. Sunrise's Answer was a Third Party Complaint against C & C Iron, Inc. (R., p. 121). On April 29, 1980, Central Crane also filed a Third Party Complaint against C & C Iron, Inc. (R., p. 171). Cole was the architectural/engineering firm retained to design the building. A.M. Sunrise was the general contractor and Central Crane provided the crane and crane operator for the building project. A.M. Sunrise subcontracted the steel work on the construction project to C & C Iron, Inc. Thereafter, various measures were taken by the parties to pursue discovery.

On March 4, 1981, the deposition of John Chandler, a representative of C & C Iron, Inc., was taken. At that deposition, these questions were asked of Mr. Chandler and these answers were given:

Q. And was it your company that made the determination of how to put the steel up?

A. Yes.

Q. Did your company provide shop drawings for the fabrication of the steel structures?

A. Yes.

Q. And do you have those shop drawings?

A. At our place of business, yes.

* * * *

Q. Mr. Chandler, upon your attorney's advice to you, will you be willing to produce your file in this case for the inspection of all the parties in this case?

A. Yes.

Q. And do you have that in your possession at the present time?

A. Yes.

(R., p. 845/pp. 81-83).

Cole found it necessary to take the following actions to obtain responses from the plaintiffs to its discovery requests. On May 21, 1982, Cole served its first set of Interrogatories upon the plaintiffs (R., p. 383). The plaintiffs did not respond within the time set forth in Rule 33 and did not seek or obtain an extension from the trial court. As a result, Cole filed a Motion for Sanctions against the plaintiffs on September 20, 1982 (R., p. 393). Cole renewed its motion on May 22, 1984 (R., p. 418). The trial court ordered the plaintiffs to answer the Interrogatories by June 13, 1984 or suffer sanctions (R., p. 419). On June 11, 1984, the plaintiffs filed a Motion for Extension of Time in which to answer Cole's Interrogatories (R., p. 420). On July 24, 1984, the trial court ordered those Interrogatories to be answered within fifteen (15) days

of issuance of that Order (R., p. 422). At that time, the trial court also set the final pre-trial conference for May 31, 1985 at 9:00 a.m. and scheduled the trial, as a primary setting, for the week of July 8, 1985 (R., p. 422).

On August 8, 1984, the plaintiffs filed their objections and answers to the Interrogatories propounded by Cole approximately two (2) years earlier on May 21, 1982. Of ten (10) Interrogatories, five (5) were answered by the plaintiffs as "None," "Investigation continues," or "Not applicable" (R., pp. 426-427).

Cole propounded a second set of seventeen (17) Interrogatories to the plaintiffs on August 15, 1984 (R., p. 440). To obtain their responses, Cole filed a Motion to Compel Answers to Interrogatories on December 14, 1984, approximately six (6) months before trial (R., p. 440). The court ordered the plaintiffs to answer Cole's Interrogatories within fifteen (15) days of the signing of the Order or suffer sanctions by the Court (R., p. 441). Plaintiffs then submitted a Motion for Extension of Time for an additional ten (10) days in which to answer the Interrogatories (R., p. 441). A hearing was set by the trial court on Cole's Motion for Sanctions on January 10, 1985 (R., p. 441). Plaintiffs filed their purported Answers to Interrogatories on January 8, 1985 and moved the court to reset the hearing on Cole's Motion for Sanctions to February 21, 1985 (R., p. 451).

Thereafter, on January 15, 1985, Cole filed with the Court a *second* Motion to Compel Answers to Interrogatories Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14 and 15 previously filed on August 15, 1984 (R., p. 452). Of the seventeen (17) Interrogatories propounded to the plaintiffs, eight (8) were answered in full or in part "Unknown at this time. The investigation continues;" nine (9) were ob-

jected to in some manner six (6) months before trial (R., pp. 443-450). The trial court set the matter for hearing on January 28, 1985 at 9:00 a.m. (R., p. 455). Plaintiffs then moved, ex parte, for a continuance of the January 28, 1985 hearing date and requested the court to consolidate all pending motions with respect to discovery for hearing on February 21, 1985 at 9:00 a.m. (R., p. 463).

After hearing arguments on Cole's Motion for Sanctions on February 21, 1985, the trial court, on February 22, 1985, ordered plaintiffs to answer Interrogatory Nos. 3, 4, 8, 12 and 14 of the Interrogatories propounded by Cole and to provide the name and address of their expert witness by 4:30 p.m. on March 4, 1985 (R., p. 574). That order specifically indicated that *if such information was not furnished, plaintiffs' Complaint against Cole would be dismissed with prejudice* (R., p. 574). On March 1, 1985, plaintiffs filed and obtained an additional ex parte extension of time not to exceed fourteen (14) days in which to provide the necessary answers (R., p. 588). The court granted such motion extending the plaintiffs' deadline to March 18, 1985 to respond to the Interrogatories, indicating that no further extensions would be granted (R., p. 591). Plaintiffs filed a second set of responses to the Interrogatories propounded by both A.M. Sunrise and Cole on March 18, 1985 (R., p. 612). Of the five (5) Interrogatories the plaintiffs were to answer for Cole, plaintiffs responded to four (4) with the answer "*Unknown at this time, investigation continues;*" one (1) Interrogatory was answered as "*Unknown,*" approximately one hundred twenty (120) days before trial (R., pp. 612-619). Plaintiffs further failed to provide the name and address of their expert witness. On March 19, 1985, after argument by counsel for all parties, the court granted Cole's motion for dismissal.

On April 2, 1985, A.M. Sunrise filed its Motion for Dismissal and the court signed the order the same day (R., p. 639). This marked the *third* time in this case that the trial court dismissed plaintiffs' Complaint against a defendant, with prejudice, for failure to comply with the rules of discovery and court imposed deadlines to enforce compliance with those rules. Plaintiffs' Complaint against Central Crane was dismissed on August 21, 1982 for plaintiffs' failure to comply with the trial court's order requiring them to respond to Central Crane's discovery requests (R., p. 397).

Subsequent to the dismissals, the plaintiffs inundated the trial court with post-trial motions (R., pp. 641, 746, 754, 767). Hearings were held on virtually every motion filed by the plaintiffs (R., pp. 735, 760, 775). Plaintiffs then filed three (3) separate Motions to Correct Errors, all of which were denied by the trial court on January 29, 1986 (R., p. 793).

Plaintiffs perfected an appeal to the Court of Appeals of Indiana. On March 30, 1987, the Court of Appeals affirmed the dismissal by the trial court. Rehearing was denied by the Court of Appeals on May 26, 1987. Plaintiffs then filed a Petition for Transfer to the Supreme Court of Indiana. The Supreme Court of Indiana denied plaintiffs' Petition to Transfer on August 23, 1988.

As stated in the petition, the plaintiffs raised the questions presented here for the first time in the Petition for Rehearing before the Court of Appeals of Indiana, Fourth District. The alleged federal questions for which review is being sought by the plaintiffs were never raised or addressed before the trial court in any of the three (3) Motions to Correct Errors filed with that court, and were never raised or briefed before the Court of Appeals on first review.

SUMMARY OF ARGUMENT

This Court is without jurisdiction to review the final judgment of the Supreme Court of Indiana in this case in that the alleged federal questions presented to this Court have never been properly raised, preserved or passed upon by the state courts below. Under Indiana law, to initiate an appeal a Motion to Correct Errors must be filed pursuant to Indiana Rules of Trial Procedure, Rule 59. An error not specifically raised in a party's Motion to Correct Errors is deemed waived on appeal. Plaintiffs filed three (3) Motions to Correct Errors in this matter; none of these motions contained any reference to a federal due process claim. No such issue was briefed before the Court of Appeals of Indiana on first review. In fact, plaintiffs admit in their petition that the due process claims were first presented in their Petition for Rehearing before the Court of Appeals of Indiana. Obviously, the Court of Appeals did not pass upon the issue of due process and the Supreme Court of Indiana is similarly bound to review only those issues expressly raised in the opinion of the Court of Appeals. Plaintiffs' admission that the federal issue of due process was raised for the first time in their Petition for Rehearing before the Court of Appeals of Indiana is tantamount to an admission of waiver of any right to raise a federal issue at this juncture.

Assuming *arguendo* that jurisdiction exists to review the Petition for Writ of Certiorari of the plaintiffs, their claims must fail on the merits. Contrary to plaintiffs' statements, Cole was prejudiced by the actions of the plaintiffs. Plaintiffs' failure to name an expert and their refusal to give specific answers to Cole's Interrogatories

approximately one hundred twenty (120) days before trial denied Cole the opportunity of learning plaintiffs' theories of liability and specific allegations of negligence. Cole had a right to this information in order to prepare a proper defense. Plaintiffs' actions also denied Cole sufficient time to find a suitable expert to rebut the opinions upon which plaintiffs would rely to prove their theory of liability.

Plaintiffs' allegations of "obstruction of justice" are also without foundation. No actions on the part of the defendant, Cole, prevented the plaintiffs from complying with the trial court's orders compelling them to file specific responses to Cole's Interrogatories. Cole did not deliberately conceal any documents nor did it intentionally give false information about the identity and/or location of witnesses. The very documents which the plaintiffs characterize as critical were in the possession of C & C Iron, Inc. since the inception of this litigation. Plaintiffs made no attempt to obtain these documents until *March 1, 1985.* After notification of the location of the documents, plaintiffs took *no* further steps to obtain them.

Similarly, plaintiffs' contentions that their actions were not willful or done in bad faith are incorrect; the record in this case speaks for itself. It contains glaring examples of plaintiffs' continual non-compliance with court orders made to protect the rights of each defendant. Contrary to plaintiffs' assertions, Central was dismissed from this suit as a result of plaintiffs' deliberate failure to respond to a discovery request. Plaintiffs' theory that they purposely allowed a default is without any substantive support in the record. Further, it took Cole approximately two (2) years and two (2) Motions for Sanctions to obtain the answers to ten (10) Interrogatories filed in May, 1982. The answers to five (5) Interrogatories were as follows "None," "Investigation continues," and "Not applicable."

Even under threat of dismissal from the trial court, plaintiffs never sufficiently answered Cole's second set of Interrogatories, nor did they reveal the name of their expert. Moreover, and again contrary to plaintiffs' assertions, earlier discovery in the form of plaintiffs' Answers to Central's Interrogatories, plaintiffs' Answers to Cole's first set of Interrogatories and the deposition of plaintiff, Joseph Stout, did not provide the information sought by Cole in its second set of Interrogatories. Dismissal was warranted as a sanction in response to the repeated delays and contumacious conduct evidenced by the plaintiffs and borne out by the record in this case.

Further, the fact that plaintiffs' Complaint had been dismissed as to all defendants as a result of the intransigence of their attorneys does not constitute an infringement of their due process guarantees, particularly under the facts of this case. This Court has clearly established the principle that a litigant is bound to his lawyer's acts. Plaintiffs voluntarily chose their attorneys as their representatives and they cannot now avoid the consequences of their acts or omissions.

ARGUMENT

I.

THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE FINAL JUDGMENT OF THE SUPREME COURT OF INDIANA IN THIS CASE FOR THE REASON THAT THE ALLEGED FEDERAL QUESTIONS PRESENTED TO THIS COURT HAVE NEVER BEEN PROPERLY RAISED, PRESERVED OR PASSED UPON BY THE STATE COURT BELOW.

Plaintiffs have filed a Petition for Writ of Certiorari seeking review of three (3) alleged federal questions, each question invoking the due process clause of the United States Constitution. They attempt to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3) (1982). That statute requires that the plaintiffs have "specially set up or claimed under the Constitution . . . of . . . the United States" in the state courts the right they now seek to have enforced. Further, Rule 21.1(h) of this Court requires that the plaintiffs "specify the stage in the proceedings, *both in the court of first instance and in the Appellate Court* at which the federal question sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court . . . . (Emphasis added). To comply with Supreme Court Rule 21.1(h), plaintiffs stated the following:

> The federal question was *first* fully presented in the Appellate Court by *Stouts' Petition for Rehearing.*

Petition, p. 6. (Emphasis added). No further information is offered to indicate how the question was allegedly raised or how the court acted upon it.

Raising a federal question as an issue on appeal for the first time in a Petition for Rehearing is not sufficient to

preserve that issue for review by this Court. Under Indiana law, error not brought to the attention of the trial court is waived. *Thompson v. Daviess-Martin County REMC*, ____ Ind. ____, 486 N.E.2d 1102, 1104 (1985). To initiate an appeal in Indiana, a party must file a Motion to Correct Errors pursuant to Indiana Rules of Trial Procedure, Rule 59. An error not specifically raised in the party's Motion to Correct Errors is deemed waived on appeal. *Orkin Exterminating Company, Inc. v. Traina*, ____ Ind. ____, 486 N.E.2d 1019, 1025 (1986); *Williams v. Graber*, ____ Ind. App. ____, 485 N.E.2d 1369, 1377 (1985); *Greenbriar Hills, Inc. v. Boes*, ____ Ind. App. ____, 473 N.E.2d 1040, 1042 (1985). Three (3) Motions to Correct Errors were filed in this case (R., p. 793). A review of these pleadings demonstrates that no federal question was raised. Thus, under Indiana law, the plaintiffs have waived any federal question for purposes of appeal. If the questions were not properly before the Indiana Court of Appeals for review, they cannot be properly before this Court for review.

Similarly, a review of the plaintiffs' initial brief to the Court of Appeals of Indiana demonstrates that *no* due process question was before that court. The entire thrust of plaintiffs' brief was directed to the appropriateness of dismissal as a first sanction under Rule 37 of the Indiana Rules of Trial Procedure, dealing with failure to make or cooperate in discovery, a rule strikingly similar, if not identical to, Federal Rule of Civil Procedure 37. It should be no surprise that nowhere in the opinion of the Court of Appeals of Indiana is any federal question involving due process mentioned, let alone expressly passed upon, and it is that opinion that was before the Indiana Supreme Court on the Petition for Transfer. *See* Petition, Appendix B-1.

This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." *Webb v. Webb*, 451 U.S. 493, 495, 101 S.Ct. 1889, 1891 (1981). Here, the plaintiffs cannot rebut the assumption; their statement that federal due process claims were presented for the first time in their Petition for Rehearing is an express admission of waiver of those issues on appeal under the law of the State of Indiana.

In *Webb v. Webb*, *supra*, this Court was presented with a factual situation similar to the one in this case. *Webb* involved a custody dispute between the mother and father of a minor child. A Georgia trial court awarded custody of the child to the former husband and the wife appealed. The Georgia Supreme Court affirmed and the wife petitioned for certiorari. This Court found that she failed to raise the issue in the state proceedings, that the Georgia Supreme Court failed to rule on the federal issue and that, as a consequence, it had no jurisdiction in this case. *Webb*, 451 U.S. at 501-502, 101 S.Ct. at 1894. In so doing, the Court spoke to the issue of comity as a compelling rationale for their decision stating that the principle of comity requires:

> [A] proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Webb, 451 U.S. at 499-500, 101 S.Ct. at 1893. (Citations omitted).

As in *Webb*, the state courts in this case have not been afforded fair opportunity to address the federal question of due process sought to be presented. It is clear that no federal due process claim was presented to the state trial court through a Motion to Correct Errors, the initial step in perfecting an appeal under Indiana law, no such question was raised in the initial brief to the Court of Appeals of Indiana, and no such question was mentioned or passed upon by the Court of Appeals of Indiana, the court whose opinion was the focus of review by the Supreme Court of Indiana. Since the federal questions involving due process have not been properly preserved, this Court should deny plaintiffs' Petition for Writ of Certiorari.

II.

DISMISSAL OF THE COMPLAINT OF THE PLAINTIFFS, JOSEPH AND BARBARA STOUT, AGAINST THE DEFENDANTS, COLE & ASSOCIATES, INC. AND A.M. SUNRISE CONSTRUCTION COMPANY, INC., WAS AN APPROPRIATE SANCTION FOR PLAINTIFFS' REPEATED FAILURE TO COMPLY WITH INDIANA COURT RULES AND THE TRIAL COURT'S DISCOVERY ORDERS.

Assuming *arguendo* that this Court has jurisdiction of this matter, a review of the record will clearly demonstrate that the plaintiffs were not denied due process in the state proceedings. This case had been pending for approximately six (6) years at the time of dismissal. During that period, petitioners had displayed indifference to the proceedings and a proclivity for dilatory tactics. The record is replete with instances of plaintiffs' failure to voluntarily comply with the Indiana Rules of Trial Procedure. No attempt was made to submit responses to discovery requests within the thirty (30) day period set out in Indiana Rule of Trial Procedure 33. Similarly, the plain-

tiffs ignored court orders requesting that they make answers more specific. The trial court displayed great patience in giving the plaintiffs numerous opportunities to comply with its orders before dismissing the Complaint of the plaintiffs against all *three* (3) defendants. It specifically advised the plaintiffs that if sufficient answers were not provided to Cole, dismissal would result. Irrespective of this warning, incomplete answers were filed in response to the court's order, the name of the plaintiffs' expert witness was never provided and dismissal followed.

After the dismissal, the trial court was inundated with countless post-trial motions. Approximately three (3) hearings were held on the motions. Pages of transcript reveal that the trial court examined each of the spurious claims and excuses of the plaintiffs. Even after such scrutiny, the trial court found *no reason* to alter its Order of Dismissal.

The Court of Appeals was the *second* court to review this matter. Plaintiffs filed a brief of approximately fifty (50) pages with a thirty-five (35) page Appendix and a Reply Brief of twenty-two (22) pages. After review of this material, the Court of Appeals of Indiana affirmed the dismissal of the plaintiffs' Complaint against Cole & Associates, Inc., and A.M. Sunrise because it found that the plaintiffs had "evinced a pattern of blatant disregard for the trial court's orders concerning discovery." Petition, Appendix pp. B-6 - B-7. The Court of Appeals of Indiana found no single act of non-compliance by the plaintiffs against any one defendant; it found a *pattern* of blatant non-compliance against each defendant, Central Crane, Cole & Associates, Inc. and A.M. Sunrise, throughout the course of the litigation spanning six (6) years. After a *second* forty-one (41) page brief filed by the plaintiffs in sup-

port of their Petition for Rehearing, the Court of Appeals denied the Petition for Rehearing. Appendix A-1.

Subsequently, a *third* court, the Supreme Court of Indiana, reviewed this case on plaintiffs' Petition to Transfer with the benefit of a third forty-five (45) page brief in support of their petition and with the benefit of oral argument before the Court. Transfer was denied. Petition, Appendix C-1.

Plaintiffs seek now to invoke yet a *fourth* court's review of this record alleging that this Court's precedent supports their contention that the dismissal of their Complaint violated their due process guarantees. Federal decisions dealing with dismissal as a result of disobedience of a trial court's orders fully support the results reached by each court in this case under Indiana law. Once a plaintiff has disobeyed an *express order by a court* without substantial justification, dismissal may be freely ordered. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S.Ct. 2778, 2780-81 (1976). As the Court of Appeals of Indiana noted, the record supports a pattern of such disobedience, not a solitary incident. Dismissal was appropriate and no due process guarantees were infringed.

A. Cole Was Prejudiced And Its Rights Obstructed By Plaintiffs' Continued Non-Compliance With Court Orders.

Plaintiffs falsely contend that Cole already possessed all the information it was seeking in its discovery requests. Plaintiffs argue that since Cole had filed a Certificate of Readiness, that act demonstrated that Cole was not prejudiced or delayed by plaintiffs' failure to provide pertinent information necessary for the defense of this litigation. The filing of a Certificate of Readiness in the Porter

Superior Court is simply a predicate to obtaining a date for a pre-trial conference and a trial setting. It is not an iron-clad document attesting to the fact that no further preparation for trial is necessary. Despite the fact that a Certificate of Readiness was filed in 1981, the final pre-trial conference was not set until May 31, 1985 and the trial was set for the week of July 8, 1985. It is obvious that the plaintiffs' attorneys were, and still are, unfamiliar with the local rules of the trial court in which they "vigorously" litigated a case that was pending for six (6) years.

Nor do plaintiffs understand the effect of the delay and prejudice by their failure to name an expert witness approximately one hundred twenty (120) days before trial. The trial court and the Court of Appeals of Indiana recognized that the failure of the plaintiffs to retain an expert to prove their theories of liability and specific allegations of negligence one hundred twenty (120) days prior to trial effectively precluded Cole from learning the theories and specific allegations against which it would defend. Plaintiffs' actions denied Cole ample opportunity to find a suitable expert with sufficient time to learn the case.

Plaintiffs' claim that prior responses to a set of ten (10) Interrogatories from Cole and several depositions taken earlier in this action supplied all the information needed by Cole. Cole would remind the Court that of the first set of ten (10) Interrogatories propounded by Cole, the plaintiffs answered five (5) of those dealing with expert witnesses and their testimony, "None," "Investigation continues," or "Not applicable." Further, the depositions of the plaintiff, Joseph Stout, Joseph Stout's employer, and the records deposition of Mr. Stout's workmen's compensation carrier offered no information as to the specific acts or omissions of negligence on the part of Cole that caused or contributed to the alleged accident, the docu-

ments in the possession of the plaintiffs which would prove the acts of negligence alleged against Cole, the details that would substantiate that there was a mechanical or structural failure, or the plaintiffs' expert witness. Plaintiffs' good faith and veracity must be questioned where they make a claim that Cole had all the information it required through prior discovery requests when such claim can be, and has been, proven false through a simple review of the record. In *Ingalls Shipbuilding, Inc. v. United States*, 857 F.2d 1448 (Fed. Cir. 1988), a case cited by the plaintiffs in which a discovery sanction precluded a party from introducing further evidence on an issue, the court reversed and remanded because it found that the moving party had the necessary information in its possession. That case has no applicability here. Cole did not have in its possession the information sought in its second set of Interrogatories.

B. Petitioners' Charge Of Obstruction Of Justice Is Unfounded And Has No Factual Basis In The Record Before The Court.

Plaintiffs' specific charges of obstruction of justice are blatant untruths. Cole never falsely denied that it had employed an engineer or engineering firm on the construction project in question. Cole was the architectural/engineering firm on the project; it had no need to "employ" or "engage" anyone since their own staff was available to perform any assignment. The plaintiffs never asked Cole to state the name of its staff engineer assigned to the project.

As for the "withheld documents," the trial court entertained numerous post-trial motions on this issue. In addition, three (3) lengthy and comprehensive hearings were held on this issue and the trial court gave no credence

to the plaintiffs' allegations. The Court of Appeals of Indiana noted this in its opinion. *See* Petition, Appendix B-1, pp. B-1 - B-7, n.5. The record will reflect that the trial court stated numerous times that the dismissal order was not based upon any considerations specifically related to the documents plaintiffs claim were withheld from them; rather, the dismissals were based upon the plaintiffs' repeated failure to comply with the court's discovery orders. (R., pp. 877, 898-890).

Further, the very documents which the plaintiffs characterize as critical, were in the possession of C & C Iron, Inc. since the inception of this litigation. Plaintiffs were aware of this since May 4, 1981 at the time the deposition was taken of John Chandler, a representative of C & C Iron, Inc., and it was established that C & C Iron, Inc. had the necessary documents. Plaintiffs made no attempt to locate these documents until March 1, 1985 and took no steps to obtain such documents once such information was provided to them.

C. The Trial Court Need Not Have Specifically Found That The Plaintiffs Acted Willfully Or In Bad Faith.

Trial Rule 37(B)(2)(c) of the Indiana Rules of Trial Procedure allows a trial court to impose the sanction of dismissal if a party fails to *obey an order* to provide or permit discovery. *See also Burns v. St. Mary Medical Center*, ____ Ind. App. ____, 504 N.E.2d 1038, 1039 (1987); *Mulroe v. Angerman*, ____ Ind. App. ____, 492 N.E.2d 1077, 1080 (1986). A specific finding of bad faith need not be made by the trial court; the record in this case, however, is replete with repeated incidents of violations of the trial court's orders. The trial court carefully considered the record in this case and gave explanations of its rulings in hearings on post-dismissal motions which are included in

the record of this case (R., pp. 877, 898-890). The failure of plaintiffs' counsel to respond to discovery requests was not due to "inability" fashioned by circumstances beyond his control. Rather, the longstanding delay in basic discovery compliance can only be characterized as "willful." In fact the circumstances in this case are not unlike those in *National Hockey League, supra,* in which this Court found sufficient evidence of "flagrant bad faith" and "callous disregard" of responsibility to uphold the District Court's dismissal of the action. *See National Hockey League,* 427 U.S. at 640-641, 96 S.Ct. at 2779-80. (Plaintiff's counsel repeatedly failed to answer Interrogatories or otherwise object in a timely fashion despite warnings from the court that failure to respond would result in sanctions).

Further, the case law of Indiana construing Rule 37 (B)(2)(c) fully supports the use of dismissal as a first sanction. The various districts of the Court of Appeals of the State of Indiana unanimously support the position that dismissal is permitted when the record before the trial court evidences a clear record of delay or numerous instances where a party defies or disobeys a trial court's orders. *Mulroe v. Angerman,* 492 N.E.2d at 1079; *Pitts v. Johnson County Department of Public Welfare,* ____ Ind. App. ____, 491 N.E.2d 1013, 1015 (1986); *Nichols v. Indiana State Highway Department,* ____ Ind. App. ____, 491 N.E.2d 227, 229 (1986); *Foote v. Baltimore & Ohio Railroad Company,* ____ Ind. App. ____, 465 N.E.2d 219, 222 (1984); *Breedlove v. Breedlove,* ____ Ind. App. ____, 421 N.E.2d 739, 743 (1981).

Further, plaintiffs argue that the Court of Appeals attributed an unwarranted interpretation to the prior dismissal of defendant, Central Crane. Contrary to plaintiffs' contentions, Central was dismissed from the suit as a re-

sult of plaintiffs' failure to respond to a discovery request. Plaintiffs' theory, that they purposely allowed a default, is suspect in that it was never offered to the trial court or to the Court of Appeals in their initial brief; this argument was raised for the first time in plaintiffs' Petition for Rehearing before the Court of Appeals of Indiana.

D. Plaintiffs' Answers To Cole's Interrogatories Were Inadequate And Plaintiffs Never Provided The Name Of Their Expert Witness As Directed By The Court On February 22, 1985.

Plaintiffs would have this Court believe that their revised answers were sufficient to Cole's second set of Interrogatories "under the circumstances." A review of what the record will reveal about these responses is in order.

In its Order of February 22, 1985, the trial court ordered more specific answers to five (5) Interrogatories. Interrogatory No. 3 requested the specific acts or omissions of negligence on the part of Cole that caused or contributed to the alleged accident at issue. As a response, the plaintiffs did list nineteen (19) acts of purported negligence but this was merely a repetition of the list of negligent acts that appeared on the face of their Complaint filed in October of 1979 (R., pp. 613-614).

Interrogatory No. 4 requested that plaintiffs identify any statutes, regulations, rules or orders that plaintiffs claim Cole violated (R., p. 614). Plaintiffs responded that they did not know, inasmuch as they had not been able to retain an expert willing to give a written opinion on the matter. As noted by the Court of Appeals, at the same time the plaintiffs contended that they had lost their expert because of a conflict, the plaintiffs' counsel acknowledged in an Affidavit in a post-trial motion that he

had contacted and was working with another expert at that time. The Court of Appeals further noted that the plaintiffs did not meet with an engineering expert until 1985 although the action had been on file since October of 1979. *See* Petition Appendix B-5, n.4.

As for plaintiffs' argument that their second expert was denied access to documents he needed for a proper evaluation of the case, Cole would reiterate that the "withheld documents" were available at C & C Iron, Inc. as early as March, 1981; a special request for this material was made by the plaintiffs in March of 1985 and they were advised that such materials were at the office of C & C's counsel. They made no attempt, however, to obtain those documents.

Interrogatory No. 8 sought information directed at documents in the possession of the plaintiffs to prove the acts of negligence alleged against Cole (R., p. 616). In response, plaintiffs listed the documents obtained through the discovery process to date, most of which were supplied by Cole or other parties. Interrogatory No. 12 requested information relative to actual or constructive notice of any negligence by Cole (R., p. 617). Four (4) months before trial, the plaintiffs answered "Unknown." As with the other Interrogatories, the answers supplied by plaintiffs do not reveal any more information as to what Cole was to defend itself against in this lawsuit.

Cole's Interrogatory No. 14 asks for details that substantiated the contention that there was a mechanical or structural failure. Again, four (4) months before trial, plaintiffs offered the list of allegations stated in their Complaint filed in October, 1979 before any discovery could have taken place.

These answers were incomplete and evasive and pursuant to Trial Rule 37(A)(3), such answers are to be treated as a *failure* to answer. On March 19, 1985, after two (2) sets of Interrogatories totaling twenty-seven (27) requests, two (2) Motions to Compel, two (2) Motions for Sanctions, and numerous extensions of time, Cole had no more information upon which to defend this litigation than it had in October, 1979 when the suit was filed. Under these circumstances, both case authority and Trial Rule 37 of the Indiana Rules of Trial Procedure allow the use of the sanction of dismissal if warranted by repeated delays and contumacious conduct as evidenced by the plaintiffs in this case.

III.

DISMISSAL OF THE PLAINTIFFS' COMPLAINT AS A SANCTION FOR NON-COMPLIANCE WITH PRE-TRIAL DISCOVERY REQUESTS IS NOT A VIOLATION OF THE DUE PROCESS GUARANTEES OF THE PLAINTIFFS IN THAT THE PLAINTIFFS ARE RESPONSIBLE FOR THEIR ATTORNEY'S ACTS OR OMISSIONS.

Plaintiffs contend that the dismissal of their Complaint further deprives them of due process guarantees because they, themselves, were innocent of any wrongdoing. This argument would require this Court to ignore its own established precedent. In *Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S.Ct. 1386 (1962), this Court expressly stated:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of represen-

> tative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'

Id. 370 U.S. at 633-634, 82 S.Ct. at 1390. (Citations omitted).

Further, in a footnote the Court goes on to say:

> And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the *defendant* . . . .

Id. 370 U.S. at 634, n.10, 82 S.Ct. at 1390, n.10. (Emphasis in the original). *See also Farm Construction Services, Inc. v. Fudge*, 831 F.2d 18, 20 (1st Cir. 1987); *Kagan v. Caterpillar Tractor Company*, 795 F.2d 601, 611 (7th Cir. 1986); *Tolliver v. Northrop Corp.*, 786 F.2d 316, 319 (7th Cir. 1986); *Cine Forty-Second Street Theater Corp. v. Allied Artists*, 602 F.2d 1062, 1068 (2nd Cir. 1979).

A trial court's power to dismiss a case is designed both to elicit action for the parties in the case at hand and to induce litigants and lawyers in other cases to adhere to timetables. A court cannot lightly excuse a litigant because of the lawyer's neglect without abandoning the pursuit of these objectives. *Tolliver*, 786 F.2d at 319.

Plaintiffs argue that under the facts and circumstances of this case, dismissal was too harsh a sanction. At the time of dismissal, the defendants had been embroiled in this litigation for approximately six (6) years. The Court, too, was victimized in that it spent considerable time and money attempting to administer this lawsuit, only to be

frustrated by the plaintiffs' failure to act. A lesser sanction than dismissal in an action pending for approximately six (6) years and set for trial in approximately one hundred twenty (120) days would not have been adequate. The trial court showed great patience and gave the plaintiffs numerous opportunities to comply with its orders and adequate time in which to do so. The Court, even though not required, specifically advised the plaintiffs that dismissal would result for continued failure to comply with its orders. Plaintiffs had no legal excuse or justification for their failure to continually ignore and disobey the trial rules and the orders of the trial court; dismissal was an appropriate sanction and most certainly did not impinge on the due process guaranteed to the plaintiffs under the federal Constitution.

CONCLUSION

A court of law has the basic duty to protect the rights of the parties before it and to assure that those fundamental rights are not abridged. The record before this Court leaves no doubt that the trial court dealt fairly with and extended itself to protect plaintiffs' rights. However, all parties and their attorneys have a concomitant duty to the court to file suits in good faith, and to pursue them with diligence and to comply with court rules and proper orders of the court. While the good faith of the plaintiffs *in filing* this lawsuit is not in question, the record reveals such a lack of diligence and good faith on the part of the plaintiffs, coupled with what can only be considered a willful refusal to comply with the discovery rules and the

orders of the trial court, so as to fully justify the dismissals entered in this case.

WHEREFORE, the respondent, Cole & Associates, Inc., respectfully requests this Court to deny the Petition for Writ of Certiorari to the Supreme Court of Indiana and the Indiana Court of Appeals of petitioners, Joseph Stout and Barbara Stout.

Respectfully submitted,

STEVEN A. JOHNSON *
DANIEL A. GIOIA
KATHLEEN M. MAICHER
SPANGLER, JENNINGS, SPANGLER
& DOUGHERTY, P.C.
8396 Mississippi Street
Merrillville, Indiana 46410
(219) 769-2323

Attorneys for Respondent,
COLE & ASSOCIATES, INC.

* Counsel of Record

APPENDIX

[*Letterhead Of*]

STATE OF INDIANA
CLERK OF THE SUPREME COURT
COURT OF APPEALS AND TAX COURT

DANIEL ROCK HEISER, CLERK
217 STATE HOUSE
INDIANAPOLIS, 46204
TELEPHONE 317-232-1930

DANIEL AUGUST GIOIA
8396 MISSISSIPPI ST.
MERRILLVILLE, IN 46410-0000

Cause Number
64A04-8603-CV-00070
LOWER CASE
79-PSC-3321

JOSEPH & BARBARA STOUT -V-
A.M. SUNRISE CONST. CO., ET AL

You are hereby notified that the COURT OF APPEALS has on this day 5/26/87 APPELLANT'S PETITION FOR REHEARING DENIED. WESLEY W. RATLIFF, JR., CHIEF JUDGE. SULLIVAN, J. WOULD GRANT REHEARING AS TO A.M. SUNRISE CONSTRUCTION AND WOULD DENY REHEARING AS TO COLE & ASSOCIATES. APPELLANT'S MOTION TO STRIKE GRANTED. WESLEY W. RATLIFF, JR., CHIEF JUDGE.

WITNESS my name and the seal of said Court, this 26TH day of MAY, 1987

/s/ DANIEL ROCK HEISER
Clerk Supreme Court,
Court of Appeals
and Tax Court